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17 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
18 IN AND FOR THE COUNTY OF YAVAPAI

19 STATE OF ARIZONA,)	No. P1300CR20081339
)	
20 Plaintiff,)	Div. 6
)	
21 vs.)	MOTION TO PRECLUDE LATE
)	DISCLOSED WITNESSES,
22 STEVEN CARROLL DEMOCKER,)	EVIDENCE, EXPERTS AND
)	OPINIONS FROM THE STATE'S
23 Defendant.)	55-57th & EARLIER
)	DISCLOSURES
)	
)	(Oral Argument Requested)

24 **MOTION**

25 Steven DeMocker, by and through counsel, hereby respectfully requests that this
26 Court exclude witnesses, evidence, experts and opinions from the trial in this matter that
27 the State late disclosed to the defense. This motion is based on the Due Process Clause,
28 the Confrontation Clause, the Eighth Amendment and Arizona counterparts, Arizona

1 Rules of Evidence, Arizona Rules of Criminal Procedure and the following
2 Memorandum of Points and Authorities.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 A detailed history of the State's disclosure violations has been provided to the
6 Court in prior pleadings and will not be duplicated here. The disclosure deadline was
7 set by the Court on May 12, 2009, for June 22, 2009. The State has repeatedly ignored
8 this deadline. The State disclosed over 25,000 pages in February, 2010, approximately
9 70,000 pages in March and April, nine months after the deadline imposed by the Court,
10 and continues to provide late disclosure, even with less than three weeks to trial. The
11 State's practice has crippled the defense's ability to prepare for trial, review the
12 disclosure, research and hire its own experts, and prepare to confront the State's
13 evidence in a death penalty case that has been pending for over a year and a half. Trial
14 begins three weeks from today.

15 As a sanction for the State's past disclosure violations, this Court on April 8,
16 2010 struck the f(2) and (6) aggravators. The case remains a death penalty case with the
17 remaining f(5) aggravator. The Court also excluded some late disclosed emails but did
18 not exclude many other items of late disclosure, including literally tens of thousands of
19 pages of late disclosure for which the Court found the State had not exercised due
20 diligence and had not offered any good cause for its failure to timely disclose.

21 Rule 15.7 gives the Court wide discretion in imposing a sanction. The State
22 should not be permitted to thwart the Court's disclosure deadlines on the eve of a death
23 penalty trial when the Court made clear in May of 2009 that extensions for disclosure
24 would be granted only where good cause was shown. The permitted sanctions under
25 Rule 15.7 include precluding or limiting the calling of a witness, use of evidence or
26 argument; dismissing a case; granting a continuance or declaring a mistrial; holding
27 counsel in contempt; imposing costs; or other appropriate sanctions. This Court should
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1 exclude the late disclosed evidence based on the pattern of conduct evidenced by the
2 State in this case. The State has offered no explanation for its repeated failures to
3 exercise due diligence nor has it proposed any alternative sanction. Given the depth and
4 breadth of the violations at issue and the limited time to trial, in a case where Mr.
5 DeMocker's life is on the line, preclusion is the only appropriate remedy. Counsel also
6 request that the Court dismiss the remaining f(5) aggravator as the State continues to
7 violate its disclosure obligations subsequent to this Court's rulings.

8 **1. Stutchman Forensics and Photos WW**

9 On April 1, 2010 the State provided a CD to the defense labeled "Stutchman
10 Forensics." This CD appears to contain photos of shoe prints and shoe prints with an
11 overlay of a shoe. There also appears to be lines of comparison being drawn between
12 the photo of a shoe print and some shoe that's been superimposed on the photo. There
13 is no report regarding this CD and no disclosure relating to Stutchman. No expert has
14 been identified by this name and no C.V. or other documentation has been provided.
15 The defense has no idea what Stutchman Forensics is, whether or not the State intends
16 to offer or rely on any evidence from this person or persons and has no idea what that
17 information may be. There is no report of any comparison that appears to be attempted
18 in some of these photos. Nor is there any information about where these photos came
19 from, what shoe is superimposed, or how this CD came into existence. The State has
20 not provided any notice under Rule 15.6 that additional disclosure related to this CD or
21 Stutchman Forensics will be forthcoming.¹ Any testimony or evidence related to this
22 CD or Stutchman Forensics should be excluded under Rule 15.7. Furthermore, it
23 appears from later reports that this information was sent to an additional late disclosed
24

25 ¹ The Court ordered the parties to disclose a witness list by 9:00 on April 12. The State disclosed a list at that time
26 that did not include any mention of this lab. Later that afternoon the State filed a "supplemental" witness list that
27 listed "Sturchman [sic] Forensic Labs" as a witness. This was filed after the deadline imposed by the Court. NO
28 other disclosure, report, information, or notice under Rule 15.6 was provided. The defense assumes Sturchman
and Stutchman are one and the same forensics lab but has no real information about the lab or this CD.

1 State expert, Eric Gilkerson. Mr. Gilkerson should not be permitted to rely on this
2 information in the event he is permitted to testify. This CD was provided to the defense
3 with approximately one month to trial with no information about who or what it is
4 about. We are now less than three weeks to trial and the State has not provided any
5 notice about any additional forthcoming disclosure related to this CD or Stutchman
6 Forensics.

7 **2. Report from Eric Gilkerson (20699-20701)**

8 On April 2, 2010 the State disclosed an additional report from its late disclosed
9 expert Eric Gilkerson. Mr. Gilkerson now opines that La Sportiva Pike's Peak shoes
10 "could be" the sources of shoe prints identified in photos. This report is based on
11 examination of model shoes that were sent to Mr. Gilkerson but have not been provided
12 or available to the defense. This report relates to an earlier report that the State withheld
13 from the defense for a period of five months while the parties were litigating the shoe
14 print impression evidence at the scene in this Court. The Court has not previously
15 excluded Mr. Gilkerson's opinions based on late disclosure. However, because Mr.
16 Gilkerson's new opinion is based on his examination of a sample shoe that is not
17 available to the defense and has never been provided to the defense and given that his
18 opinion was not provided until four weeks prior to trial, Mr. Gilkerson's opinion should
19 be excluded based on the State's late disclosure of his opinion and non-disclosure of the
20 sample shoe to the defense. The defense has no capability in the three weeks remaining
21 to trial to examine and test the sample shoe as was done by Mr. Gilkerson. The State
22 did not provide the defense with this or any sample shoe to permit defense testing. And
23 the State did not perform this testing or disclose this evidence in time to permit the
24 defense to properly examine and confront this evidence. Mr. Gilkerson's opinion
25 should therefore be excluded pursuant to Rule 15.7.

1 Likewise on March 17, 2010 the State disclosed a CD labeled WW which the
2 accompanying photo log indicates contains photos of La Sportiva Shoes. The defense
3 was not provided with these shoes and has no opportunity to examine these shoes. All
4 photos or any examination making use of these shoes or these photographs should
5 likewise be excluded.

6 **3. Forensic Consulting Solutions (CD 6171 and 19811)**

7 On March 19, 2010 the State disclosed a CD of a forensic examination report
8 from Forensic Consulting Solutions. Forensic Consulting Solutions has not been listed
9 or identified by the State as an expert. The State has not disclosed, pursuant to Rule
10 15.6 that any additional disclosure regarding Forensic Consulting Solutions will be
11 forthcoming. With less than three weeks to trial and no idea about who or what this
12 information may be about, this Court should preclude any testimony by or from
13 Forensic Consulting Solutions or any examination this entity may have performed
14 pursuant to Rule 15.7.

15 **4. Log in and Out Times for UBS Computer (19856)**

16 On March 23, 2010 the State disclosed a one page document that has three
17 columns labeled "date" "time" and "activity" with dates from May of 2008 to June of
18 2008. The document does not reveal where it came from, when it was received or who
19 retrieved the document at whose request. The State's disclosure log indentifies the
20 document as "log in/log out times for Defendant's UBS computer." This information is
21 late disclosed. The State has provided the defense with no foundation and no way to
22 verify or validate where or how this information was retrieved. The State does not
23 disclose why this information is being revealed 16 months after Mr. DeMocker's arrest
24 (while at work at UBS) and with less than two months to trial. The Court should
25 preclude admission of this information absent foundation and good cause for the State's
26 late disclosure under Rule 15.7.

1 **5. Dan Jenson**

2 On March 26, 2010 the State disclosed a new expert, Dan Jenson. The State did
3 not disclose a C.V. or report of Mr. Jenson. Instead, the State identified Mr. Jenson's
4 areas of expertise as "Sprint cell tower technology, frequency, channels, tower ranges,
5 configuration." Cell tower information has been at issue in the case since at least
6 November of 2008. The State previously late disclosed Sy Ray as a cell tower expert
7 who was the subject of other motions to preclude. The State has still not provided a
8 report or other information about what Sy Ray or Dan Jenson will testify about. The
9 State has not provided notice that any additional disclosure regarding Mr. Ray or Mr.
10 Jenson will be forthcoming as required by Rule 15.6. With three weeks to trial, these
11 experts should be precluded pursuant to 15.7.²

12 **6. Dr. Steven Pitt**

13 The State late disclosed Dr. Steven Pitt as a "rebuttal" expert on January 29,
14 2010. The State has not provided the required notice regarding what Dr. Pitt relied
15 upon under Rule 15.1³, nor has it identified what Dr. Pitt will rebut or what aggravators
16 Dr. Pitt will support, as required by Rule 15.1(i). With less the 30 days to trial, the State
17 has not provided the Court or the defense with the required notice that any additional
18 report or information from Dr. Pitt will be forthcoming. Dr. Pitt is identified as a
19 forensic psychologist. He has never met or examined Mr. DeMocker and therefore has
20 no basis upon which to opine on any matter relating to psychology. Given that no
21 report has been provided, and that the State has not given the required notice under Rule
22 15.1 or Rule 15.6 regarding additional disclosure, Dr. Pitt should be precluded as a
23 witness at any phase of the trial.⁴

24 _____
25 ² On April 12, the State disclosed Mr. Jenson as a Custodian of Record but did not identify him as an expert.

26 ³ It lists "any and all contact between Defendant and Carol Kennedy including but not limited to email, text
27 messages, and handwritten notes," "any and all reports submitted by other experts," and a "summary of
28 Defendant's and Carol Kennedy's financial records."

⁴ Dr. Pitt appears to be removed from the State's April 12, 2010 witness list so this may be moot. Given that the
State has removed and then replaced witnesses multiple times, the defense raises this issue to preserve it.

1 **7. Divorce Records (19874-19881)**

2 On March 26, 2010 the State disclosed records of a prior divorce filing and
3 dismissal between Mr. DeMocker and Ms. Kennedy from June of 2006. The State was
4 aware of this information at least as of June of 2009. (See Evid Item 453). The State
5 offers no justification for its failure to disclosure these records until five weeks before
6 trial. In the absence of good cause demonstrated by the State, these records should be
7 precluded or should weigh in favor of the Court striking the remaining f(5) aggravator
8 as a sanction for the State's continued disclosure violations.

9 **8. American Express Records (19976-20124), National Bank Records**
10 **(20125-20128), Bank of America Records (20129-20162), Bank of**
11 **America (20163-20173)**

12 On April 2, 2010 the State disclosed a series of bank records. The American
13 Express account was known to the State as of June of 2009 and yet these records were
14 not disclosed until one month before trial. The National Bank records were known to
15 the State as of November of 2008 and these records not disclosed to the defense until
16 one month before trial. The Bank of America account records (20129-20162) is the
17 estate bank account of Carol Kennedy of which Katherine DeMocker is the executrix
18 and is not relevant and should be excluded on these grounds. The State has also been
19 aware of this account as of October of 2008 and yet did not disclose these records to the
20 defense until one month prior to trial. Finally, Bank of America account records
21 (20163-20173) relate to an account known by the State as of November of 2008 and yet
22 these records were not disclosed until one month to trial. All of these records should be
23 precluded as late disclosed under Rule 15.7.

24 **9. YY – Photos from September 2008**

25 On April 2, 2010 the State disclosed photos of 840 Country Club that were taken
26 in September of 2008. The State offers no rationale for its late disclosure of these items.
27 These photos relate to the emails that the State has acknowledged were late disclosed
28

1 without good cause at earlier hearings on this matter. These photos should be excluded
2 absent a showing of good cause.

3 **10. Late Disclosed Witnesses**

4 The State disclosed a witness list in accordance with the Court's order on April
5 12 at 9:00. This list includes previously undisclosed witnesses and witnesses whom the
6 State previously specifically instructed it would not be calling, whom it disclosed late
7 and whom it declined to schedule defense interviews. The following is a late disclosed
8 witness: a COR from the State Department. These witnesses do not relate to newly
9 discovered evidence or late discovered witnesses. The State has disclosed these
10 witnesses with less than 30 days to trial. The State did not provide notice under Rule
11 15.6 that further disclosure on these issues would be forthcoming. Additionally, the
12 State previously told the defense that it would not be calling back country search team
13 members Townsend, Halter and Lee. The State cancelled defense interviews as a result
14 of this representation. These witnesses now appear on the State's witness list. The
15 same is true with respect to Anne Gorden-Lorentzen, Leslie Madaffari, Alyssa Watt,
16 Ken Brewer, Sandi Brown, whom in mid-February the State told the defense it would
17 not be calling.

18 Later that same day, past the 9:00 a.m. deadline, the State disclosed additional,
19 previously undisclosed witnesses. These witnesses include Jan Greenhow, about whom
20 the defense knows nothing, having has no interview or report of any contact with Ms.
21 Greenhow. She is disclosed as an "appraiser." Karen Gere is disclosed as offering
22 testimony related to the "autopsy" conducted on July 3, 2008. Ms. Gere has never
23 before been disclosed as a witness of any kind on any issue. Det. Dan Pryor from DPS
24 is also late disclosed as a witness relating to the "motorcycle." There is no report or
25 interview from Det Pryor. DOC inmate Michael Kalmbach has been disclosed as
26 testifying about "statements by defendant." The defense has no disclosure, report or
27

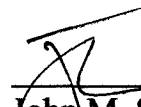
1 interview related to Mr. Kalmbach and has no idea what he may testify about. The State
2 also lists a COR for Amazon. No COR for Amazon has ever been disclosed until now.
3 Finally, the State lists a witness from American Express related to Credit Card
4 Statements that are also late disclosed and are the subject of other motions to preclude.
5 All of these witnesses are disclosed for the first time. The State has not provided any
6 rationale for disclosing these witnesses with less than 30 days to trial. Nor has the State
7 provided any prior notice under Rule 15.6 that disclosure would be forthcoming.

8 The Court should exclude the above described evidence, experts and opinions
9 based on its late disclosure. The evidence was known to the State months, and in some
10 cases well over a year, before it was disclosed to the defense. The State failed to
11 exercise due diligence to request and disclose the evidence to the defense. The State has
12 not offered any good cause for its failure to exercise due diligence. The late disclosure
13 has prejudiced the defense's ability to prepare for trial and confront the evidence, as
14 outlined above and in prior motions. The evidence should therefore be excluded
15 pursuant to Rule 15.7.

16 Defendant Steven DeMocker, by and through counsel, hereby requests that this
17 Court prohibit the State from offering late disclosed evidence, experts and opinions as
18 described above.

19 DATED this 13th day of April, 2010.

20
21 By:



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ORIGINAL of the foregoing hand delivered for
filing this 13th day of April, 2010, with:

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COPIES of the foregoing hand delivered this
this 13th day of April, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
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Joseph C. Butner, Esq.
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